Oi Lai Seng v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05–324 OF 2009

B

ABDUL MALIK ISHAK, AZHAR MA'AH AND MOHTARUDIN BAKI JJCA

8 FEBRUARY 2012

C

Criminal Law — Murder — Appeal against conviction and sentence — Circumstantial evidence — Whether trial judge erred in convicting appellant in reliance on wholly circumstantial evidence — Whether death caused by appellant — Whether appellate court should disturb findings of fact — Second charge of causing injuries — Whether proven — Whether appeal should be allowed

D

The appellant was charged with the murder of one Chong Tai Tai ('the deceased'), the mother of one Yee Woon Long ('Yee'), from whom the appellant had borrowed money. The appellant was also charged with causing the injuries sustained by Yee from a shot fired from a pistol. The prosecution's case was that Yee had sought out the appellant for the return of the RM2,000 he had lent to him and that in his attempt to get his money back Yee and the appellant had travelled in Yee's car to the appellant's hotel. While Yee, the deceased ('who was in the car at that time') and the appellant were driving to the hotel a quarrel had broken out between Yee and the appellant. The quarrel had allegedly resulted in the appellant taking out a pistol and shooting Yee in the chest before the latter jumped out of the car. The appellant had then driven off with the deceased in the car, leaving Yee to rush to a nearby police station for assistance. The car and the dead body of the deceased were later recovered from a car parked at the basement of a hotel. The doctor who performed the post mortem confirmed that the deceased had died of the gunshot wounds. The pistol causing the fatal injuries to the deceased was discovered as a result of the information from the appellant with regards to his arrest in another case. Based on the evidence adduced the trial judge came to a finding that a prima facie had been made out against the appellant and ordered him to enter his defence to the charges. The appellant testified that the gun belonged to Yee and that two shots were fired from the pistol while the appellant was wresting the pistol away from Yee. The appellant denied having shot the deceased or Yee. At the end of the whole case the trial judge held that there was overwhelming evidence both direct and circumstantial linking the appellant with the death of the deceased as well as to the injuries to Yee. The appellant was thus convicted of the two charges. He was sentenced to death in respect of the first charge of murder and 18 years imprisonment for the second charge of inflicting injuries on Yee. This was the appellant's appeal against that conviction and sentence. In this appeal the appellant submitted that the trial judge had erred by relying heavily on

E

F

G

H

I

A circumstantial evidence and the evidence of Yee, whose credibility was in issue. The appellant submitted that other than Yee's evidence that he was shot by the appellant, there was no direct evidence to say who shot the deceased.

Held, dismissing the appeal in respect of the first charge and allowing the B appeal in respect of the second charge:

(1) In coming to his finding of guilt of the appellant the trial judge did not only rely on the circumstantial evidence but also on the direct evidence in the form of Yee's testimony. These were findings of fact by the trial judge C and the appellate court should always be slow in disturbing such findings unless there were substantial and compelling reasons for disagreeing with this finding (see para 11).

(2) Based on the testimony of the doctor who conducted the post mortem, the trial judge had found that the appellant's intention was to kill and not D merely to injure. This court agreed with this conclusion (see para 12).

(3) As for the second charge, the evidence showed that the prosecution had failed to tender any medical report to evince the nature and extent of injuries alleged to have been inflicted by the appellant on Yee as a result of E the shot fired from the pistol. As such the conviction and sentence imposed in respect of the second charge were set aside (see para 14–15).

[Bahasa Malaysia summary

Perayu dituduh membunuh Chong Tai Tai ('si mati'), ibu kepada Yee Woon F Long ('Yee'), yang daripadanya perayu telah meminjam wang. Perayu juga didakwa menyebabkan kecederaan yang dialami oleh Yee dari tembakan yang dilepaskan daripada pistol. Kes pendakwaan adalah bahawa Yee telah meminta perayu untuk pemulangan RM2,000 yang dia telah pinjamkan kepadanya dan bahawa dalam usaha untuk mendapatkan wangnya semula, Yee dan perayu, G menggunakan kereta Yee, telah ke hotel perayu. Sedang Yee, si mati ('yang berada di dalam kereta ketika itu) dan perayu memandu ke hotel, pergaduhan telah tercetus antara Yee dan perayu. Pergaduhan didakwa telah menyebabkan perayu mengambil pistol dan menembak Yee di dada sebelum dia melompat keluar dari kereta. Perayu kemudian memandu dengan si mati di dalam kereta, H meninggalkan Yee bergegas ke balai polis berhampiran untuk mendapatkan bantuan. Kereta dan mayat si mati kemudiannya diperolehi dari kereta yang diletakkan di tingkat bawah tanah sebuah hotel. Doktor yang melakukan bedah siasat mengesahkan bahawa si mati telah meninggal dunia akibat luka tembakan. Pistol yang menyebabkan kecederaan maut kepada si mati telah I ditemui hasil maklumat dari perayu melalui penangkapannya dalam kes lain. Berdasarkan keterangan yang dikemukakan hakim bicara memutuskan bahawa prima facie telah dibuat terhadap perayu dan memerintahkannya untuk membela diri terhadap pertuduhan. Perayu memberi keterangan bahawa pistol adalah milik Yee dan bahawa dua tembakan dilepaskan dari

pistol ketika perayu cuba merampas pistol daripada Yee. Perayu menafikan telah menembak si mati atau Yee. Di akhir keseluruhan kes, hakim bicara berpendapat bahawa terdapat keterangan-keterangan ikut keadaan dan secara langsung menghubungkan perayu dengan kematian si mati serta kecederaan terhadap Yee. Perayu dengan itu disabitkan dengan kedua-dua pertuduhan. Beliau dijatuhkan hukuman mati bagi pertuduhan pertama iaitu membunuh dan 18 tahun penjara bagi pertuduhan kedua kerana mencederakan Yee. Ini adalah rayuan perayu terhadap sabitan dan hukuman. Dalam rayuan ini perayu menghujahkan bahawa hakim bicara telah terkhilaf kerana bergantung sepenuhnya kepada keterangan ikut keadaan dan keterangan Yee, yang mana kredibilitinya menjadi isu. Perayu menghujahkan bahawa selain daripada keterangan Yee bahawa dia telah ditembak oleh perayu, tiada keterangan secara langsung yang mengatakan siapa yang menembak si mati.

Diputuskan, menolak rayuan bagi pertuduhan pertama dan membenarkan rayuan bagi pertuduhan tuduhan kedua:

(1) Dalam menyimpulkan dapatan bersalah perayu, hakim bicara tidak hanya bergantung kepada keterangan-keterangan ikut keadaan tetapi juga kepada keterangan secara langsung dalam bentuk testimoni Yee. Ini adalah dapatan fakta oleh hakim bicara dan Mahkamah Rayuan perlu sentiasa mengelakkan daripada campur tangan dalam dapatan tersebut melainkan jika terdapat sebab-sebab substansial dan memaksa kerana tidak bersetuju dengan dapatan ini (lihat perenggan 11).

(2) Berdasarkan keterangan doktor yang menjalankan bedah siasat, hakim bicara telah mendapati bahawa niat perayu adalah untuk membunuh dan bukan semata-mata untuk mencederakan. Mahkamah bersetuju dengan kesimpulan ini (lihat perenggan 12).

(3) Bagi tuduhan kedua, keterangan yang menunjukkan bahawa pihak pendakwaan telah gagal untuk mengemukakan apa-apa laporan perubatan untuk memperlihatkan sifat dan tahap kecederaan yang dikatakan telah dikenakan oleh perayu kepada Yee akibat tembakan daripada pistol. Oleh itu, sabitan dan hukuman yang dikenakan bagi pertuduhan kedua diketepikan (lihat perenggan 14–15).]

Notes

For cases on appeal against conviction and sentence, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1341–1343.

Legislation referred to

Evidence Act 1950 s 8

Appeal from: Criminal Trial No 45–12 of 2002 (High Court, Temerloh)

S Vijaya Retnam @ Veizay (Veizay & Co) for the appellant.

Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azhar JCA (delivering judgment of the court):

[1] In the High Court below, the appellant was charged with three offences of which he was found guilty and convicted of the following two charges:

> Pertuduhan Pertama:
>
> Bahawa kamu pada 29hb. Jun, 2001 jam lebih kurang 1.45 pagi, di Km. 0.5, Jalan Genting Highlands, Genting Highlands, dalam Daerah Bentong, di dalam Negeri Pahang Darul Makmur, telah melakukan kesalahan bunuh iaitu dengan menyebabkan kematian kepada seorang bernama Chong Tai Tai (KPT: 390313-05-5026). Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 kanun Keseksaan.
>
> Pertuduhan Kedua:
>
> Bahawa kamu pada 29hb. Jun, 2001 jam lebih kurang 1.45 pagi, di Km. 05, Jalan Genting Highlands, Genting Highlands, dalam Daerah Bentong, di dalam Negeri Pahang Darul Makmur, telah melepaskan tembakan kepada Yee Woon Long (KPT: 581123-05-5115) dengan pengetahuan kamu, bahawa perbuatan kamu itu sekiranya telah menyebabkan kematian kepada Yee Woon Long (KPT: 581123-05-5115) tersebut, kamu telah melakukan kesalahan bunuh dan kamu telah menyebabkan kecederaan parah kepada Yee Woon Long (KPT: 581123-05-5115) tersebut dengan perbuatan itu. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 307 Kanun Keseksaan.

[2] Having been found guilty and convicted on the above charges the learned judicial commissioner sentenced the appellant to hang till death in respect of the first charge and 18 years imprisonment for the second charge. Hence the appeal.

[3] The factual matrix of the prosecution's case as narrated by the learned judicial commissioner in his grounds of judgment are as follows:

> The unfolding of the events in this case leading to the commission of the offences by the accused was narrated by SP4 Yee Woon Long. According to SP4 the accused asked for a loan of RM2,000 as he had suffered losses while gambling in Genting Highlands. SP4 gave a sum of RM1,000 first with a promise to remit the balance to the accused account which he did the next day. SP4 produced the pay in slip for this remittance ('P7').

On the day of the incident SP4 sought out the accused for the return of the money. The accused first asked for a lift from SP4 to Kuala Lumpur to get the money. SP4 refused whereby the accused asked SP4 to take him to the First World Hotel to get the money.

SP4 who had brought along his mother ('the deceased') agreed to drive to the hotel mentioned by the accused. In the car there was a quarrel between SP4 and the accused with regards the money borrowed. In the midst of this quarrel the accused took out a pistol and threatened to shoot SP4.

SP4 stopped the car and jumped out and at the same time he heard a gunshot and realised he was shot on the chest SP4 then rushed to the Genting Police Station which was nearby and informed the police on duty of the accused driving off with his car with his mother inside the car.

The police on duty women Constable Rohani bt Mohammad ('SP3') took down SP4's report and this was produced in court as P5. Later on SP3 received information of a car parked at the basement of Resort Hotel parking with a dead body inside. SP3 prepared another report of this information and this report was marked as P6.

At least two teams of police officers went to the place mentioned in the information at separate times. The sum total of the evidence of the police officers was that they found the body of an old lady (the deceased) slumped in a pool of blood at the passenger's seat.

Apart from that the police found at last three empty shells and a slug and some items of clothing and a bag outside the car. The body of the deceased was sent for post mortem where it was confirmed that the deceased had died of gunshot wounds where the bullets had tore across her body rupturing the aorta. The doctor who did the post mortem Dr Zahari bin Mohd Noor ('SP20') apart from testifying on the cause of death also gave reasons as to his findings that the injuries on the deceased were gunshot wounds.

The gun causing the fatal injuries to the deceased was later found by the Ipoh Police. The police officer ASP Loo Chin Thein ('SP10') who had arrested the accused with regards to another case testified that he was led by the accused to a place where they recovered a pistol.

The bullets found in SP4's body and the shells and the slug found at the car where the deceased was found matched the pistol discovered as a result of the information from the accused. This was the testimony of the retired government chemist Mr Pua Hiang ('SP13').

[4] Based on the above, the learned judicial commissioner came to a finding that a prima facie case has been made out against the appellant and ordered the appellant to enter upon his defence to the charges aforementioned.

THE DEFENCE

[5] The defence evidence of the appellant came solely from his own testimony.

[6] According to him on 27 June 2001 he was at Genting Highlands casino, gambling. He lost money at the gambling table, but somehow he still wanted to carry on gambling. As he had no money left, he was introduced by a friend to someone who was a money lender (along). This along was SP4. The appellant requested SP4 to loan him RM4,000 and offered to SP4 his car, a Proton Wira as a security. Following this SP4 gave the appellant a sum of RM2,000 first and promised to remit the balance later. However, SP4 did not keep his promise as he only banked in RM1,000 into the appellant's account the following day. This prompted the appellant to contact SP4 to enquire about the balance of the loan. SP4 made appointment to see the appellant at the lift of the hotel. They met at 12.30am. SP4 came with an old lady who was his mother. Then the three of them got into SP4's car and proceeded to Kuala Lumpur. While in the car the appellant enquired about the balance of the loan. SP4 accused the appellant of cheating him by offering him the Proton Wira car belonging to someone else as security for the loan. They got into heated argument. Somewhere along the way SP4 stopped his car and took out a pistol from the underneath of his seat. There was a tussle inside the car where the appellant wanted to wrest the pistol from SP4. Two shots were fired from the said pistol by SP4. Both shots missed the appellant. The appellant managed to disarm SP4 finally. SP4 bolted and left the car. Soon after that the appellant drove the car back to Genting with the old lady inside the car, wanting to retrieve his things from his hotel room.

[7] The appellant denied that the pistol belonged to him and that he was the one who shot the old lady, SP4's mother (the deceased) and also SP4.

THE APPEAL

[8] The first point raised by counsel for the appellant before us is the elementary principle concerning the burden of proof. It is submitted that the falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. It is submitted that aside from the evidence of SP4 who testified that he was shot by the appellant, there was no direct evidence to say who shot the deceased. The evidence of the ballistic expert did not tell who actually fired the shot from the pistol. In the circumstances, it is submitted further that the evidence relied upon by the prosecution to drive home its case against the appellant is substantially circumstantial. It is suggested that the shots that have killed the deceased could have been fired by person unknown or even by SP4 himself during the tussle inside the car. None of these possibilities could be discounted.

[9] There is another pertinent point raised before us by learned counsel for the appellant in support of the appeal. It is the issue of credibility of SP4.

Counsel submits without saying more that the witness SP4 'is not a truthful witness'. No elaboration was made to boost this contention.

[10] The other point that was brought for our consideration in this appeal is the evidence of SP13, the ballistic expert who said in his testimony that he was not able to say for certain as to whether the bullets marked as P14A and P18A that were said to have killed the deceased were fired from the pistol P9.

[11] In addressing the abovementioned issues, the learned judicial commissioner in his grounds of judgment had these to say:

> Direct/Circumstantial Evidence:
>
> At the end of the whole case I concluded that there was overwhelming evidence both direct and circumstantial linking the accused with the death of the deceased as well as to the injuries to SP4.
>
> The direct evidence in this case came from SP4 and the accused who were not only at the scene but were involved in the happening of the events leading to the injuries of SP4 as well as the death of SP4's mother. In this case I did not have the benefit of watching the demeanor of SP4 as his evidence was recorded by another judge but this did not in any way hamper my assessment of the evidence of SP4.
>
> The fact that tilted in favour of my believing the evidence of SP4 rather than the evidence of the accused was the fact that SP4's evidence was supported by other independent evidence.
>
> One of the main pieces of evidence which supported the evidence of SP4 was the discovery of the pistol on the information of the accused. The police officer's testimony detailing out the events leading to the discovery of the pistol was virtually unchallenged apart from the fact that the discovery was not related to this case but to some other case.
>
> The wording of s 27 of the Evidence Act are clear and do not restrict the information to any particular case but instead concentrates on the discovery of the item as a result of the information given.
>
> 27 How much of information received from the accused may be proved.
>
> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.
>
> The information by the accused leading to the discovery was as follows as recorded by ASP Loo Chin Thein (SP10).

> … The further fact that the pistol was hidden by the accused not only shows the knowledge of the accused of the pistol but more importantly the conduct of the accused in hiding the pistol indicated guilty intent. Evidence of conduct is a relevant piece of evidence as illustrated by s 8 of the Evidence Act …
>
> The other evidence which was uncontroverted and supported the testimony of SP4 was the fact that the accused was the last person to be seen with the deceased. This coupled with the fact that the pistol was with the accused as even by his own testimony that he had grabbed the pistol from SP4 and the subsequent finding of the deceased's body not very long after points only to one and only one conclusion that it was the accused who had fired the fatal shots causing the death of the deceased. This is the only irresistible conclusion …
>
> Weapon of Crime:
>
> In this case, apart from the facts that the pistol was discovered on the information of the accused the prosecution led credible evidence in proving that this was the very pistol which caused the death of the deceased as well as the injuries to SP4.
>
> This evidence came from the testimony of SP13 Mr Pua Hiang a very senior and retired chemist. SP13 described in detail the tests he carried out and his final determination linked the pistol discovered to the crime scene in the present case. This was a final nail in the case against the accused one which the accused could not explain away apart from casting aspersions by stating that the pistol was hidden by a friend at the place it was discovered. This was a feeble attempt in diverting culpability from himself.

FINDINGS OF THIS COURT

[12] Essentially, the appeal is against the findings of the learned judicial commissioner in that he relied rather heavily on circumstantial evidence and the evidence of SP4. The approach to be taken by an appellate court when dealing with a trial court's appraisal of circumstantial evidence is well established by high authorities. When circumstantial evidence is put before the trial judge in an attempt to prove certain facts imperatively there has to be also direct evidence to support the circumstantial evidence. In our case here, the learned judicial commissioner has obviously dealt with and addressed the issues raised in the appeal adequately. We are satisfied that the learned judicial commissioner in coming to his finding of guilt of the appellant did not only rely on the circumstantial evidence but also on direct evidence that came from the testimony of the witness SP4. These are the finding of facts by the learned judicial commissioner which an appellate court should always be slow in disturbing unless there are substantial and compelling reasons for disagreeing with the finding.

[13] Having dealt with factual matrix of the case and issues that arose therefrom, the learned judicial commissioner went on to deal with the mental element of the offence ie the mens rea. According to him the intention of the appellant to kill the deceased is glaringly obvious. The testimony of SP20 the doctor conducting the post mortem clearly shows that the appellant put the pistol in contact with the deceased at an extremely close range when he fired the shots. The burn marks on the skin at the point at which the gun was placed leaves no doubt that the appellant's intention was to kill and not merely to injure. To this conclusion we can't agree more.

[14] In the upshot we dismissed the appellant's appeal in respect of the first charge and affirmed the conviction and sentence passed by the learned judicial commissioner.

[15] Moving on to the second charge and the conviction and sentence imposed by the learned judicial commissioner, we are unable to agree with such order. Our perusal of the evidence shows that the prosecution had failed to tender any medical report to evince the nature and extent of injuries alleged to have been inflicted by the appellant on SP4 as a result of the shot fired from the pistol P9.

[16] This being the case, in regard to the second charge, we allowed the appeal and set aside the order of conviction and sentence imposed.

Appeal in respect of first charge dismissed and appeal in respect of second charge allowed.

Reported by Kohila Nesan